TAN TECK CHEW

v.

PP

COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD JCA
KC VOHRAH JCA
FAIZA TAMBY CHIK J
[CRIMINAL APPEAL NO: C-05-5-1997]
3 JANUARY 2002

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in heroin - Section 37(da) - Presumption of trafficking - Whether may be invoked based on presumption of possession under s. 37(d) - Whether presumption of trafficking may only be invoked based on a finding of actual possession*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 37(da) - Presumption of trafficking - Invoked based on presumption of possession under s. 37(d) - Whether proper - Whether trial judge erred in applying presumption upon presumption - Muhammad Hassan v. PP*

This was an appeal by the appellant against the trial judge's decision convicting him under s. 39(B)(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and sentencing him to death.

Held:
Per KC Vohrah JCA

[1] The trial judge was wrong to have relied on the presumptions of possession and knowledge of the heroin under s. 37(d) of the Act from his factual finding of the appellant being in control and custody of the plastic bag containing the heroin, and on the basis of such presumptions to presume that he was trafficking in the heroin. The defence should have been called on the charge of possession of the heroin. The trial judge was however correct in law when he ruled, inter alia, that the appellant had failed on a balance of probabilities to rebut the statutory presumptions in s. 37(d) that he knew that what was contained in the bag was heroin and that he was in possession of the heroin. (pp 741 g & 742 b-c)

[Appeal allowed; appellant's conviction and sentence reduced accordingly.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Ini adalah rayuan oleh perayu terhadap keputusan hakim perbicaraan yang mensabitkan beliau di bawah s. 39(B)(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') dan menjatuhkan hukuman mati.

Diputuskan:
Oleh KC Vohrah HMR

[1] Hakim perbicaraan adalah salah kerana telah bergantung pada tanggapan pemilikan dan pengetahuan mengenai dadah heroin tersebut di bawah s. 37(d) Akta tersebut daripada keputusan faktual beliau mengenai perayu yang mempunyai kawalan dan penjagaan beg plastik yang mengandungi dadah heroin tersebut, dan atas dasar tanggapan yang sedemikian membuat andaian bahawa beliau mengedar dadah heroin tersebut. Pembelaan seharuslah telah dipanggil atas pertuduhan pemilikan dadah heroin tersebut. Hakim perbicaraan walaubagaimanapun adalah betul di sisi undang-undang ketika beliau memutuskan, antara lainnya, bahawa perayu telah gagal atas imbangan kebarangkalian untuk mematahkan tanggapan berkanun di dalam s. 37(d) bahawa beliau mengetahui bahawa apa yang terkandung di dalam beg tersebut adalah dadah heroin dan bahawa beliau mempunyai di dalam milikan beliau dadah heroin.

[Rayuan dibenarkan; pensabitan perayu dan hukuman dikurangkan sehubungan itu.]

Case(s) referred to:
Muhammad Hassan v. PP [1998] 2 CLJ 170 ***(foll)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 12(2), 37(d), (da), 39A(2), 39(B)(1)(a), (2)

For the appellant - Karpal Singh; M/s Karpal Singh & Co
For the Public Prosecutor - Vong Poh Fah

[Appeal from High Court, Kuantan; Criminal Trial Court No: 47-6-1994]

Reported by Suresh Nathan

JUDGMENT

KC Vohrah JCA:
At the hearing of the appeal of Tan Teck Chew against his conviction on a charge of trafficking in 44.110 grammes of a dangerous drug, heroin, and the sentence of death accordingly passed on him, we allowed the appeal against both conviction and sentence. We instead substituted therefor a conviction for

possession of the heroin under s. 12(2) of the Dangerous Drugs Act 1952 (the Act) and sentenced him to 15 years imprisonment from the date of arrest and ten strokes under s. 39A(2) thereunder.

We now give our reasons. The trafficking charge against the appellant was that he on 16 April 1994 at about 11.30pm at a car park behind Komplek Teruntum at Jalan Mahkota, Kuantan, Pahang, on his own behalf, had trafficked in a dangerous drug ie, 40.11 grammes of heroin, an offence under s. 39(B)(1)(a) punishable under s. 39(B)(2) of the Act.

At the close of the prosecution case on the basis of the evidence adduced the learned trial judge held that the appellant was in custody and control of the bag containing the heroin and invoked s. 37(d) of the Act to presume possession of the heroin in the appellant with the added presumption that he knew the nature of the heroin. He relied on the facts which he had set out in his judgment to base such a decision. The facts on which he relied on are fairly straight forward.

ASP Mohd Luthfi Ismail bin Abdullah (PW2) carried out an operation at 10.30am on 16 April 1994 in order to arrest drug traffickers in the area of a car park behind the building of Komplek Teruntum in Kuantan, Pahang. The team was broken into three groups one of which was led by ASP Mohd Luthfi comprising himself and two others.

At 11.30pm the ASP saw the appellant walking from the exit of the basement parking area of the building in the direction of a car park behind the building. The ASP and his two men rushed towards the man who was then holding a plastic bag. The ASP seized the package from the man and examined the bag in front of him. Inside the bag were two packages which were secured with cellophane tape. The bundles contained a red coloured substance which the Government Chemist PW1 subsequently analysed and found to contain 40.11 grammes of heroin, a dangerous drug listed under the 1st Schedule to the Act.

The man was arrested and brought to the Pahang Police Headquarters after which he led the police to his house where no drugs were found.

These were essentially the facts, the primary facts, set out by the trial judge when he decided to call the appellant to make his defence. The trial judge held that at the close of the prosecution case the facts established that the appellant was in control and custody of the plastic bag. He then relied on s. 37(d) of the Act to presume that the appellant was in possession of the drugs and to presume that he knew the nature of the drug.

This is what the learned trial judge stated:

Dari keterangan di atas, saya berpuas hati, di akhir kes pendakwaan, tanpa keraguan yang munasabah, bahawa semasa ditangkap tertuduh sedang membawa satu beg plastik yang mengandungi dua bungkusan kertas surat khabar. Di dalam setiap bungkusan kertas surat khabar itu terdapat satu beg plastik yang mengandungi serbuk ketulan berwarna kemerahan yang disahkan oleh SP1 mengandungi heroin. Jumlah berat bersih heroin itu ialah 40.11 gram. Memandangkan bahawa beg plastik itu berada di dalam jagaan dan kawalan tertuduh semasa di ditangkap maka mengikut sek. 37(d) Akta Dadah Berbahaya 1952 ('Akta') tertuduh adalah dianggap memiliki dadah heroin tersebut dan mengetahui jenis dadah tersebut sehinggalah dibukitkan sebaliknya. Berdasarkan alasan-alasan di atas, saya memutuskan bahawa di akhir kes pendakwaan pihak pendakwa telah berjaya membuktikan kesnya melampaui sebarang keraguan yang munasabah. Dengan itu saya telah memanggil tertuduh untuk membela diri di atas pertuduhan yang dikemukakan terhadapnya.

(From the evidence as set out above, I am satisfied that at the close of the prosecution case that, without a reasonable doubt, when the accused was arrested he carried a plastic bag which contained 2 packages wrapped in newspapers. In each newspaper package was found a plastic bag containing a powdery and granular substance red in colour which was found by PW1 (the Government Chemist) to contain heroin. The nett weight of the henoin was 40.11 grammes. Having regard to the fact that the plastic bag was in the custody and control of the accused at the time of the arrest then, pursuant to s. 37(d) of the Dangerous Drugs Act 1950 ('the Act'), the accused is presumed to be in possession of the heroin and to have known the nature of the said drug until the contrary is proved. On the basis of the above stated ground, I held that at the close of the prosecution case the prosecution had proved its case beyond any reasonable doubt. With that I called upon the accused to make his defence on the charge against him.)

It will be noted from this passage that the counsel had only found as a fact, on the basis of the evidence before him, that the appellant was only in custody and control of the plastic bag containing the heroin. It was not an affirmative finding on the evidence that he was in possession of the bag much less of the heroin contained therein. There was of course no finding of knowledge of the heroin in the bag. The trial judge had to rely on s. 37(d) of the Act to infer as a presumption that the heroin contained in the plastic bag was in his possession and to infer as a presumption that he knew of the nature of the heroin.

Section 37(d) reads as follows:

37. In all proceedings under this Act or any regulation made thereunder –

(a) ...

...

(d) any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;

(e) ...

Having relied on the presumptions in s. 37(d) the trial judge then called upon the appellant to make his defence upon the change of trafficking. Although he did not mention it at that stage it is apparent from the later part of his judgment (when he discussed the defence of the appellant) that he had relied on s. 37(da) of the Act to presume that the appellant was trafficking in the said drug as he had been presumed to be in possession of the 44.11 grammes heroin because of the application of s. 37(d) which gave rise to such presumption of possession.

37. In all proceedings under the Act or any regulation thereunder –

(a) ...

...

(da) any person who is found in possession of –

...

(i) 15 grammes or more in weight in of heroin;

otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug;

...

The trial judge gave his grounds of decision on 23 February 1997. On 9 December 1997 the Federal Court in *Muhammad bin Hassan v. PP* [1998] 2 CLJ 170 clarified that the presumption of trafficking under s. 37(da) cannot be invoked upon the presumption of possession that arises under s. 37(d) through mere proof of custody or control of the thing containing a dangerous drug. This is what the Federal Court observed at p. 190:

> In our view, there is a clear undeniable distinction between the word 'deemed' used in s. 37(d) and the word 'found' employed in s. 37(da) of the Act. The 'deemed' state of affairs in s. 37(d) (ie deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs, ie the finding of custody or control. Such presumptions as under s. 37(d) (and, for

> that matter, the one under s. 37(da)) are sometimes described as 'compelling presumptions' in that upon proof of certain facts by a party (in our present case, proof of custody or control in s. 37(d) by the prosecution), the court must in law draw a presumption in its favour (ie presumptions of possession and knowledge) unless the other party proves the contrary. Such a presumption has the compelling force of law. It is a deduction which the law requires the trial court to make. On the other hand, the word 'found' in the opening phrase of s. 37(da) connotes a finding after a trial by the court.

The court in elaborating further on the interpretation of s. 37(da) stated:

> Further more, the basic on primary facts needed to raise 'deemed' possession and 'deemed' knowledge under s. 37(d) of the Act and those required to raise 'presumed ... trafficking' under s. 37(da) are different. To come to the presumptions of possession and knowledge under s. 37(d), one need only to arrive at a finding of having had 'in custody or under ... control anything whatsoever containing' the drug (as opposed to the drug itself) whereas to arrive at the presumption of 'trafficking' under s. 37(da), a finding of being 'in possession' of the drug is necessary (in addition, of course, to proof of the relevant minimum quantity specified). In view of the above differences, it would be unduly harsh and oppressive to construe the automatic application of presumption upon presumption as contended by the learned deputy public prosecutor – a construction that ought to be adopted only if, upon the wordings of the two subsections, such an intention of the Parliament is clear, which, in our opinion, is not.
>
> In our view, to constitute 'possession' under s. 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, there must be an express affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence.

In our case the trial judge was therefore wrong to have relied on the presumptions of possession and knowledge of the heroin under s. 37(d) from his factual finding of the appellant being in control and custody of the plastic bag containing the heroin and on the basis of such presumptions to presume that he was trafficking in the heroin. The defence should have been called on the charge of the possession of the heroin.

We like to point out that the learned DPP, Mr. Vong, had argued that there was enough evidence adduced by the prosecution to show that the appellant had knowledge as to what he was carrying in the bag but as Mr. Karpal Singh for the appellant had pointed out, the trial judge's finding at the close of the prosecution case on the evidence was that the appellant had custody and control of the bag and not a finding that there was affirmative evidence that he had possession of the heroin or knowledge thereof. We agree with Mr.

Karpal Singh; it would be wrong for this court to interfere with that finding because if the trial judge was of the view that there was sufficient evidence for him to conclude *ex facie* that the appellant had such possession and knowledge he would have so stated but instead he relied on the presumption of possession and knowledge under s. 37(d) of the Act.

The appellant's defence at the trial should have been considered as a defence on the charge of possession and not on trafficking. We are, however, satisfied that the trial judge was correct in law when he ruled, *inter alia*, that the appellant had failed on a balance of probability to rebut the statutory presumptions in s. 37(d) that he knew that what was contained in the bag was heroin and that he was in possession of the heroin. We ignored his ruling on trafficking where he applied the presumption of trafficking in s. 37(da) upon the presumptions of possession and knowledge of the heroin under s. 37(d) which, as we have stated, cannot be done.

It is for these reasons we allowed the appeal against the conviction on trafficking and the sentence of death and substituted therefor a conviction for possession of the heroin under s. 12 of the Act and a sentence of 15 years from the date of arrest and ten strokes under s. 39A(2) thereof.